File: A23 284 273 - Jackson, Georgia Date: JAN 27 1999

In re: PAUL SAPEU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Keith E. Hunsucker
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Continuance; termination of proceedings

In a decision dated November 20, 1997, the Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). The Immigration Judge ordered the respondent removed from the United States to Liberia. The respondent appealed. The appeal will be dismissed. The request for oral argument before the Board is denied. See 8 C.F.R. § 3.1(e).

The respondent is a 36-year old native and citizen of Liberia, who entered the United States on or about December 30, 1975, as a nonimmigrant student. He became a lawful permanent resident of the United States on October 10, 1980. He is married to a United States citizen who was naturalized on February 19, 1997. He was convicted on July 18, 1994, in the Superior Court of Clayton County, State of Georgia, by a jury, of two counts of cruelty to children. He was sentenced to 20 years in prison on each count to run concurrently. The Immigration Judge terminated proceedings, apparently because the respondent's conviction was on direct appeal. The Court of Appeals of Georgia on August 15, 1996, affirmed the lower court's judgment. Sapeu v. State, 474 S.E. 703 (Ct. App. Ga. 1996). The respondent was served with a new Notice to Appear in removal proceedings on April 28, 1997. Based on his admissions and the record of conviction, the Immigration Judge found him removable as one convicted of an aggravated felony, i.e., a crime of violence. Sec. 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

On appeal, the respondent alleges that he is not removable for having committed an aggravated felony because his conviction is the subject of a habeas corpus proceeding. He also maintains that, despite his conviction, he is not guilty of cruelty to his infant son. He argues that the state conviction is defective and that a continuance or stay should be granted for him to

pursue relief from the State of Georgia. He further wished to apply for relief under section 212(c) or 212(h) of the Act, 8 U.S.C. §§ 1182(c) or 1182(h). It is also argued that deportation would constitute double jeopardy.

Section 101(a)(43)(F) of the Act states that an aggravated felony is: "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."

The term "crime of violence" is defined in 18 U.S.C. § 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In determining whether a particular offense is a "crime of violence" under this definition, we have held that either the elements of the offense must be such that physical force is an element of the crime, or that the nature of the crime -- as evidenced by the generic elements of the offense -- must be such that its commission ordinarily would present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994); see also United States v. Jackson, 986 F.2d 312 (9th Cir. 1993); United States v. Sherman, 928 F.2d 324 (9th Cir.), cert. denied, 502 U.S. 842 (1991). It is the nature of the crime that is key to the determination of whether it is a crime of violence, to wit, one must ask whether the crime involves a substantial risk of physical force. U.S. v. Rodriguez, 979 F.2d 138 (8th Cir. 1992); Matter of Magallanes, Interim Decision 3341 (BIA 1998). Where such a risk is present, the crime is to be considered a crime of violence for purposes of 18 U.S.C. § 16(b); the elements of the underlying offense need not include use, attempted use, or threatened use of force in order to be considered a crime of violence for purposes of 18 U.S.C. § 16(b). Id.

The Code of Georgia in 1994 stated:

> 16-5-70 Cruelty to children.
>
> (a) A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children when he willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.
> (b) *Any person commits the offense of cruelty to children when he maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.*
> (c) a person convicted of the offense of cruelty to children as provided in this Code section shall be punished by imprisonment for not less than one nor more than 20 years. (Emphasis added)

The respondent was found guilty of two counts of cruelty to children; he was charged both with having poured hot water on his infant son and failing to seek medical attention for the subsequent injuries. Exh. 2. Under Georgia law, the denial of necessary and appropriate medical care does not constitute a denial of sustenance, but it can constitute cruelty to a child when it causes the child "cruel or excessive physical or mental pain." Howell v. State, 180 Ga. App. 749, 350 S.E. 473 (1986). Based on the record of conviction, we conclude that the respondent was convicted of two counts of cruelty to children under that portion of section 16-5-70(b) of the Code of Georgia which requires that he maliciously cause his son excessive physical pain. [1]

Upon applying the 18 U.S.C. § 16(b) test to the conduct required for a conviction under the relevant section, we find that the respondent was convicted of a "crime of violence" within the meaning of the Act. See section 101(a)(43)(F) of the Act; Matter of Alcantar, supra. The conviction clearly satisfies the test articulated at 18 U.S.C. § 16(b). We conclude that the respondent was convicted of an offense that is the type of crime that involves a substantial risk that physical force will be used against a person. See e.g. United States v. Velazquez-Overa, 100 F.3d. 418 (5th Cir. 1996) (sexual contact with a child), cert. denied, 117 S. Ct. 1283 (1997); United States v. Wood, 52 F.3d 272 (9th Cir.)(indecent liberties with a child), cert. denied, 116 S. Ct. 217 (1995); United States v. Frias-Trujillo, 9 F.3d 875 (10th Cir. 1993)(burglary); United States v. Flores, 875 F.2d 1110 (5th Cir. 1989)(burglary); Matter of B-, Interim Decision 3270 (BIA 1996)(statutory rape). In support of this conclusion, we point to the incontrovertible evidence that pouring hot water on his son and not seeking medical treatment would require the use of some degree of force. His acts represent both actual and potential physical force which could cause harm to a child. The respondent was sentenced to the maximum penalty of 20 years in prison on each count, and, thus, the term of imprisonment is at least one year.

We agree with the Immigration Judge that removability was established by evidence that is clear and convincing. 8 U.S.C. § 1229a(c)(3). The respondent's argument that he was not guilty of the offense is not an argument to be made in this forum. The Board cannot go behind the conviction to determine guilt or innocence. Matter of Madrigal, Interim Decision 3274 (BIA 1996); Matter of Roberts, 20 I&N Dec. 294 (BIA 1991); Matter of Fortis, 14 I&N Dec. 576 (BIA 1974); see Matter of Mendez-Morales, Interim Decision 3272 (BIA 1996); Matter of Reyes, 20 I&N Dec. 789 (BIA 1994). Allegations of error and a request for post-conviction relief do not prevent a conviction from being final for immigration purposes unless relief is granted. Matter of Polanco, 20 I&N Dec. 894 (BIA 1994); see Matter of Gabryelsky, 20 I&N Dec. 750, 751-52 (BIA 1993); see Okabe v. INS, 671 F.2d 863 (5th Cir. 1982); Marino v. INS, 537 F.2d 686 (2d Cir. 1976). Therefore, the Immigration Judge did not abuse his discretion in denying a continuance to allow the respondent to apply for such relief. See 8 C.F.R. § 3.29.

Deportation from the United States is not considered punishment, and, as it is a civil proceeding, the prohibition against double jeopardy does not apply. Matter of U-M-, 20 I&N Dec. 327, 334 (BIA 1991), aff'd, Urbina-Mauricio v. INS, 989 F.2d 1085 (9th Cir. 1993); Matter of Valdovinos, 18 I&N Dec. 343 (BIA 1982); see Carlson v. Landon, 342 U.S. 524

---

[1] We need not at this time decide whether the statutory provision that punishes mental cruelty could be a crime of violence as defined in section 16 of Title 18 of the U.S. Code.

(1952); Le Tourneur v. INS, 538 F.2d 1368 (9th Cir. 1976), cert. denied, 429 U.S. 1044 (1976).

The respondent has not met his burden to show that he is eligible for any form of relief from removal and the record does not disclose any basis for relief. See section 208(b) of the Act, 8 U.S.C. § 1158(b); 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); section 212(h) of the Act, 8 U.S.C. § 1182(h); section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3); section 240B(b)(1)(C) of the Act, 8 U.S.C. § 1229c(b)(1)(C). The application of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586 (IIRIRA), to bar relief for an aggravated felon is not a violation of due process. See Matter of Cazares-Alvarez, Interim Decision 3262 (BIA 1997); Matter of Yeung, Interim Decision 3297 (BIA 1996).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD